

Internal Revenue Service  
**memorandum**

CC:TL-N-1538-90  
Brl:JCAlbro

date: DEC 18 1989

Regional Counsel, North Atlantic CC:NA  
to: Attn: Kevin M. Flynn  
Special Trial Attorney

from: Assistant Chief Counsel (Tax Litigation) CC:TL

---

subject: [REDACTED]

This is in response to your request for tax litigation advice dated November 27, 1989.

ISSUE

Whether petitioners may accrue and deduct, pursuant to the all events test of Treas. Reg. Sec. 1.461-1(a)(2), the employer's portion of payroll taxes on year-end salaries where the salaries are properly accruable but unpaid at year-end and the obligation to remit the taxes does not arise until the following year when such wages are paid to employees.

DISCUSSION

As you noted in your request for advice, the Service issued an Action on Decision in the case of Eastman Kodak Co. v. United States, 534 F.2d 252 (Ct. Cl.1976) which stated that it would not follow the decision. At issue in that case was taxpayer's accrual of unpaid year-end wages and the F.I.C.A., F.U.T.A. and state employment taxes which would become payable when and if the wages were paid. The Government took the position that payroll taxes are properly accruable only for the year in which the underlying wages are actually paid. Rev. Rul. 74-70, 1974-1 C.B. 116. With respect to year-end wages, the court reasoned that taxpayer's obligation for payroll taxes on these wages became fixed and certain as an automatic consequence of the definite and legal obligation to pay the year-end wages, that the amount of the tax was calculable and that nothing depended on the taxpayer's discretion or outside events which might or might not occur. We have recently recommended that the Action on Decision approved on January 10, 1978 be withdrawn and an acquiescence be substituted. In addition, we recommended that Rev. Rul. 74-70 be reconsidered.

009239

In the case of Burlington Northern Railroad Co. v. Commissioner, 82 T.C. 143 (1984), taxpayer accrued and deducted, in 1974 and 1975, wages for its delayed payroll employees for services performed in the last half of December for each year. These wages were paid to employees on January 15 of the following year. Railroad Retirement Tax Act (RRTA) taxes were also accrued and deducted on the 1974 and 1975 year-end wages. The Commissioner's position was that although the wage accrual was proper, the RRTA tax accrual was not. The parties agreed that the amount of the taxes could be precisely determined in 1974 and 1975. The Commissioner disallowed the railroad's deduction of RRTA taxes on the basis that the all events test was not satisfied in the year the wages were earned because the legal liability to pay the RRTA taxes was not fixed until January of the following year when the corresponding wages were paid.


The Tax Court rejected the Commissioner's argument that the all events test for accrual requires the existence of a legal liability to make the payment as of the end of the year for which accrual is claimed. The court held that all of the events that fixed the amount, timing, and fact of liability for the RRTA taxes had occurred as of the end of each year at issue. Nothing depended on the taxpayer's discretion or on outside events that might or might not occur. We recently recommended the publication of an "Acquiescence" Action on Decision in Burlington Northern.

We recommended appeal of the Tax Court decision in Burlington Northern, but the Solicitor General declined to authorize prosecution of the appeal. Former Chief Counsel Goldberg personally made the decision not to protest the Tax Division's action and determined we would no longer litigate the issue. We anticipate that the two proposed actions on decision will be published shortly. In the interim we agree with your conclusion to concede the issue in the [REDACTED] case.

If you have any further questions on this matter, please contact Joyce C. Albro at 566-3442.

MARLENE GROSS

BY:

  
JUDITH M. WALL  
Chief, Branch 1  
Tax Litigation Division